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4 **UNITED STATES DISTRICT COURT**
5 **NORTHERN DISTRICT OF CALIFORNIA**
6

7 DAVID M. CURLEY, SR.,

8 Plaintiff,

9 v.

10 WELLS FARGO & CO., and others,

11 Defendants.
12

Case No. 13-cv-03805 NC

**ORDER DIRECTING PARTIES TO
SPECIFIC ARGUMENTS IN
PREPARATION FOR SUMMARY
JUDGMENT HEARING**

Re: Dkt. No. 128

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14 The Court provides notice that the parties should be prepared to address two
15 particular arguments raised in plaintiff's supplemental opposition, Dkt. No. 128.

16 First, Curley objects to the declaration of Alisha Mulder under Federal Rules of Civil
17 Procedure 26 and 37, asserting that she was not disclosed by Wells Fargo as a witness.
18 Under Rule 37(c), if a party fails to identify a witness as required by the rules, then the
19 party is not allowed to use that witness to provide evidence in a summary judgment motion,
20 "unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c).

21 Second, Curley cites four state cases on page three that he says stand for the
22 proposition that "one cannot continue to deal with a person and then retroactively assert
23 there was a material breach so as to excuse their performance."

24 IT IS SO ORDERED.

25 Date: July 21, 2015

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27 Nathanael M. Cousins
28 United States Magistrate Judge